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APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

FILE NO. 76-363

4137

ROY POWELL — APPELLANT

V. — APPEAL FROM NICHOLAS CIRCUIT COURT
HON. JOHN P. LAIR, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLEE

ROBERT F. STEPHENS
ATTORNEY GENERAL

SAM E. ISAACS, II
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G.L. TUCKER
COMMONWEALTH ATTORNEY

COUNSEL FOR APPELLEE

FILED
JUL 12 1976
MARTHA LAYNE COLLINS
CLERK
SUPREME COURT

CERTIFICATE OF SERVICE:

This is to certify that a copy of the foregoing Brief for Appellee has been mailed, postage prepaid, to Hon. John P. Lair, Judge, Nicholas Circuit Court, Courthouse, Carlisle, Kentucky 40311; Hon. G.L. Tucker, Commonwealth Attorney, 18th Judicial District, Carlisle, Kentucky 40311; and the Hon. J. Vincent Aprile, II Assistant Public Defender, 625 Leawood Drive, Frankfort, Kentucky 40601 this the 12th day of July, 1976.

Sam E. Isaacs II
Assistant Attorney General

TABLE OF CONTENTS AND AUTHORITIES

SUPREME COURT OF KENTUCKY

FILE NO. 76-363

ROY POWELL — APPELLANT

V. — APPEAL FROM NICHOLAS CIRCUIT COURT
HON. JOHN P. LAIR, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

MAY IT PLEASE THE COURT:

COUNTERSTATEMENT OF THE QUESTION PRESENTED

I.

WHETHER A CONFLICT OF INTEREST EXISTED BETWEEN APPELLANT'S TRIAL COUNSEL'S POSITION AS CITY ATTORNEY AND HIS REPRESENTATION OF APPELLANT, THUS DENYING APPELLANT FULL AND EFFECTIVE ASSISTANCE OF COUNSEL?

COUNTERSTATEMENT OF THE CASE

Appellee accepts appellant's statement of the case as substantially correct. Any disputed facts germane to the issues raised will be referred to where applicable in the arguments of appellee's brief as hereinafter set forth. The Transcript of the Record and the Transcript of Evidence will hereinafter be referred to as TR and TE, respectively.

ARGUMENT

I.

THERE WAS NO CONFLICT OF INTEREST BETWEEN APPELLANT'S TRIAL COUNSEL'S POSITION AS CITY ATTORNEY AND HIS REPRESENTATION OF APPELLANT, AND THIS APPELLANT WAS NOT DENIED FULL AND EFFECTIVE ASSISTANCE OF COUNSEL.

The same issue raised by appellant on this appeal has been decided by this Court in the case of Dawson v. Commonwealth, Ky., 498 S.W. 2d 128 (1973). In Dawson the indigent defendant was appointed counsel who also held the position of city attorney. In ruling this Court stated:

> "...An alleged conflict of interest because the trial counsel was City Attorney was rejected in Cole v. Commonwealth, Ky., 441 S.W. 2d 160 (1969) which we regard as dispositive in this case." Id. at 129.

After exhausting his state remedies, Dawson filed for a Petition for a Writ of Habeas Corpus in the United States District Court for the Western District of Kentucky. His petition was dismissed and Dawson then appealed to the Sixth Circuit Court of Appeals. Dawson argued that the appointment of the city attorney as his defense counsel per se denied him the effective assistance of counsel. The Sixth Circuit Court rejected this argument and reaffirmed its holding in Harris v. Thomas, 341 F. 2d 560 (6th Cir. 1965). Dawson v. Cowan, No. 75-1338 (6th Cir., 3-26-76), (a copy of which is attached hereto and marked Appendix A.)

In Harris v. Thomas, supra at 561, the court stated:

> "We agree with the Kentucky Court of Appeals and conclude that the city attorney was not per se disqualified to represent petitioner by reason of his office."

The Harris case is directly in point since it involved the appointment of counsel to represent an indigent defendant who also held the position of city attorney of a fourth class city and whose duties were set forth by KRS 69.560. Appellant has supplemented the record with proof that his court appointed counsel was also serving as city attorney in a city of the fourth class. (See Appendix to Appellant's Brief pages 1 and 2). In refusing to overrule their decision in the Harris case the court in Dawson v. Cowan, supra, said:

> "We are also concerned that the adoption of a per se rule might make it difficult or impossible to secure appointed counsel for indigent defendants in sparsely settled communities where there are few laywers, and most or all of them have some governmental affiliation."

Since this Court and the Sixth Circuit Court of Appeals have both rejected a per se rule of conflict of interest under the same circumstances presented by the case at bar, then appellant is not entitled to a reversal of his conviction simply because his court-appointed trial counsel also held the position of city attorney.

After assuming arguendo that this Court will reject a per se rule of conflict of interest, appellant argues that a conflict of interest is apparent from the facts and circumstances of the case.

Although the record does not reveal how appellant's trial counsel became substituted for the counsel appointed to represent him at arraignment, the record also does not disclose that appellant ever objected to the substitution or was dissatisfied with his

trial counsel; that counsel for appellant at arraignment ever objected to being replaced by appellants trial counsel; or that there was ever any question or hint of impropriety in the appointment of Mr. Hopkins as trial counsel for appellant. The record reveals that Mr. Hopkins was well acquainted with the facts of the case and well prepared for trial. The lack of a written order appointing Mr. Hopkins as trial counsel for appellant did not prejudice his substantial rights and require a reversal since the record reveals that Mr. Hopkins vigorously represented appellant at trial.

Appellant argues that the defense presented by his trial counsel was subdued and restrained. The record does not support appellant's argument. Appellant notes that a pre-trial motion was filed bearing the names of appellant and his co-defendant, and that it was signed by both counsel for appellant and counsel for his co-defendant. (Appellant's Brief p. 17). Appellant then states: "Significantly no comparable motion was filed on behalf of appellant." (Id.) After admitting that his trial counsel did make the pre-trial motion, he then argues that it is significant because he did not. This is senseless. It becomes even more senseless when the record is examined for the record reveals that appellant's trial counsel argued the pre-trial motion vehemently prior to trial (TR pp. 30-38), and during a hearing in chambers during trial (TE pp. 59-63).

Appellant's other allegation that a conflict of interest is apparent from the facts and circumstances in the record is the fact that his trial counsel elected to present no witnesses on his

behalf. Nothing in the record indicates that appellant had any witnesses that he wished to present or that his counsel refused to call witnesses in his behalf. Nor does it appear that appellant wished to take the stand in his own behalf. To the contrary, the record reveals that his trial counsel requested a five minute recess in order to confer with appellant before advising the court that appellant had no witnesses to present on behalf of his defense.

Finally, appellant cites some of the statements made by his trial counsel in his closing argument as evidence of a conflict of interest. Appellant admits that the statements revealed that "the core of the defense presented by appellant's counsel in his closing argument was that any identification by appellant was highly suspect and probably the result of 'coaching' by law enforcement agents." (Appellant's Brief p. 18). Appellant faults his trial counsel for not supporting these statements with any evidence. An examination of the record reveals that appellant is mistaken on this point for his trial counsel vigorously cross-examined both of the witnesses who identified appellant as to the circumstances surrounding their identification. (TE pp. 55-59, 63-66, 99-108). The jury was well aware of the procedures followed by the law enforcement officers in the identification of appellant.

Since appellant has failed to demonstrate that a conflict of interest between appellant and his trial counsel ever manifested itself during or prior to his trial, he has not shown that he was denied full and effective assistance of counsel, and therefore his conviction must be affirmed.

Appellant in his second argument also argues that the appointment of a city attorney to represent him at trial was

contrary to public policy and requires reversal. Again, appellant argues for a per se rule of conflict of interest which has been previously discussed. It should be noted however that this issue was considered and rejected in Dawson v. Cowan, supra, where the court rejected a per se rule and said:

> "Per se rules frequently are fashioned when there is an unusually high risk of prejudice to a party and the proofs of prejudice may be difficult to establish; or when an important social policy will be served by a prophylactic rule;...."

CONCLUSION

For the foregoing reasons appellee respectfully requests that the judgment of the trial court be affirmed.

Respectfully submitted,

ROBERT F. STEPHENS
ATTORNEY GENERAL

Sam E. Isaacs II

SAM E. ISAACS, II
ASSISTANT ATTORNEY GENERAL
CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601

COUNSEL FOR APPELLEE

No. 75-1338

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOE DAWSON,
Petitioner-Appellant,

v.

HENRY COWAN, Superintendent, Kentucky State Penitentiary,
Respondent-Appellee.

APPEAL from the United States District Court for the Western District of Kentucky.

RECEIVED
MAR 29 1976
ATTORNEY GENERALS OFFICE

Decided and Filed March 26, 1976.

Before: PHILLIPS, *Chief Judge*, EDWARDS, and McCREE, Circuit Judges.

McCREE, Circuit Judge. This is an appeal from a judgment of the District Court for the Western District of Kentucky denying appellant's petition for a writ of habeas corpus. Appellant is confined in the Kentucky State Penitentiary at Eddyville.

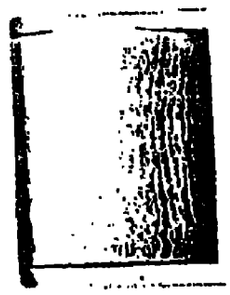
On February 23, 1972, appellant Joe Dawson was convicted by a jury of the attempted rape of a child under the age of twelve, and sentenced to twenty years confinement. Although he was also charged under the habitual offender statute, KRS he was also charged under the habitual offender statute, KRS. 431.190, the jury convicted him of only the principal offense. An appeal presenting the issue of ineffective assistance of counsel was taken to the Kentucky Court of Appeals, which affirmed the conviction.

DOCKETED
MAR 29 1976

Appellant filed a Petition for a Writ of Habeas Corpus in the district court, and again asserted the claim of ineffective as-

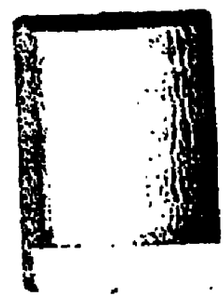
Civil ____ Criminal ____
Board of Claims ____

Appendix "A"



sistance of counsel. He alleged the following facts in support of this contention. His court-appointed counsel, John Scott McCaw, was the City Attorney for Madisonville, Kentucky, where the crime occurred. Appellant contends that McCaw's office prevented him from representing appellant with undivided loyalty. He also contends that the jury was told in connection with the habitual offender charge that appellant had previously been convicted of rape, despite the fact that the prior conviction was for attempted rape. He asserts that McCaw made no attempt to correct this descrepancy. He also complains that McCaw failed to ask the court to instruct the jury that evidence of a prior offense could be considered only in connection with the habitual offender charge, and not as proof of his guilt of the principal charge. He contends that his counsel erred in failing to object to statements volunteered by two police witnesses about an unrelated arrest warrant pending against him at the time of his arrest. Finally, he contends that after filing a motion for a new trial, McCaw abandoned him by failing to bring the motion on to be heard, which had the effect under Kentucky practice of barring an appeal.

In support of his contention that the appointment of the city attorney as his defense counsel *per se* denied him the effective assistance of counsel, appellant relies upon *Berry* v. *Cray*, 155 F. Supp. 494 (W.D. Ky. 1957). That case held that a defendant was denied the effective assistance of counsel when the county attorney, who was required by statute to assist the Commonwealth attorney in criminal prosecutions, was appointed to represent him. Appellant urges us to overrule *Harris* v. *Thomas*, 341 F.2d 560 (6th Cir. 1965), where we expressly refused to adopt a rule that a city attorney is *per se* disqualified for appointment to represent an indigent defendant accused of a crime. Appellant argues that the city attorney, who has a duty to prosecute misdemeanor cases arising under city ordinances, and who may advise city policemen from time to time, cannot maintain the unimpaired loyalty to a criminal defendant client that is required by the standard of effective assistance of



counsel. He contends that even if no actual prejudice to his interest can be shown, the appearance of impropriety and the risk of prejudice are so great that the court should forbid this practice by adopting a *per se* rule.

Per se rules frequently are fashioned when there is an unusually high risk of prejudice to a party and the proofs of prejudice may be difficult to establish; or when an important social policy will be served by a prophylactic rule; or a more definite standard is required to guide official conduct in future cases; or when case by case analysis places an unjustifiable burden on limited judicial resources. We should not consider overruling our prior decision in *Harris* v. *Thomas*, where we rejected a *per se* rule, without a record that permits us to give proper weight to these considerations. Since Dawson's petition was disposed of on motion without an evidentiary hearing, this record is an inadequate vehicle. We are also concerned that the adoption of a *per se* rule might make it difficult or impossible to secure appointed counsel for indigent defendants in sparsely settled communities where there are few lawyers, and most or all of them may have some governmental affiliation. For these reasons, and because our determination of another issue is dispositive of this appeal, we decline at this time to review our earlier decision in *Harris* v. *Thomas*.

Appellant's second contention, that McGaw's failure to bring on for hearing the motion for a new trial prevented appellant from appealing, will not support a finding of unconstitutional detention because *no* prejudice resulted. As we noted above, Dawson perfected an appeal to the Kentucky Court of Appeals, which considered the merits of his case when it affirmed the conviction.

A more difficult problem is presented by appellant's argument that McGaw failed to request the court to instruct the jury that his past conviction could be considered *only* in connection with the charge that he was an habitual offender, and *not* in connection with the charge of attempted rape for which

he was being tried. He argues that because McCaw failed to make this request, his representation failed to meet the standard of effective assistance of counsel.

Two cases bear directly upon this contention. The first is *Spencer* v. *Texas*, 385 U.S. 554 (1967). In *Spencer*, the Supreme Court considered the validity of the Texas procedure under the state habitual offender statute which permitted enhancement of the punishment of a convicted defendant who had previously been convicted of other crimes. The statute permitted the prosecution to present to the jury during the trial of the principal charge evidence of the defendant's prior convictions. The Court rejected the contention that

> the use of prior convictions in the current criminal trial of each petitioner was so egregiously unfair upon the issue of guilt or innocence as to offend the provisions of the Fourteenth Amendment that no State shall "deprive any person of life, liberty, or property, without due process of law. . . ." 385 U.S. 559.

The Court held that the state had a legitimate interest in enhanced sentence laws, and it upheld the Texas practice because the defendant's rights were protected by (1) limiting instructions to the jury, and (2) the trial judge's discretion to limit or prevent the admission of particularly prejudicial evidence.

More recently, our court considered the Kentucky practice employed in this case of introducing evidence of prior convictions (to prove habitual offender status) in the trial of the principal charge. *Evans* v. *Cowan*, 506 F.2d 1218 (6th Cir. 1974), like the case before us, was an appeal from the denial of a writ of habeas corpus. In a trial for armed robbery the state trial judge had permitted the introduction of evidence of the defendant's prior felony convictions in support of the charge that he was an habitual offender. A limiting instruction like that which the *Spencer* court found protected the de-

fendant's interests was not requested by the defendant nor given, *sua sponte*, by the trial court.

We held that the conviction violated due process, stating:

> . . . we are convinced that the possibility of egregious unfairness was so great in the absence of a limiting instruction that the failure to give one constituted clear error.
>
> The Supreme Court made it clear in *Spencer* [v. *Texas*, 385 U.S. 554 (1967)] that *the obvious prejudice to defendant could be tolerated only where the jury was admonished by the trial court not to use the evidence of previous convictions in determining guilt or innocence on the primary charge*. Further, in the circumstances presented by the record before us we hold that the trial court had the duty to give a limiting instruction even if the defendant had not requested one. 506 F.2d 1249. [Emphasis added.]

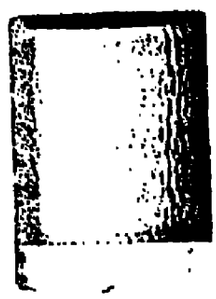
Evans v. *Cowan* and *Spencer* v. *Texas* are determinative of the issue before us. *Spencer* upheld the Texas procedure on the grounds that the defendant's interests were protected by a limiting instruction. In *Evans* v. *Cowan*, where no limiting instruction was given, we held that the prejudice to the defendant was so great that failure to give the instruction constituted plain error of constitutional magnitude, requiring relief even though the defendant did not request the instruction.

The relevant facts in this case are the same as those in *Evans* v. *Cowan*, and since, as in *Evans*, appellant's conviction was obtained in violation of due process, he is entitled to habeas corpus relief.

Although appellant presented the failure to request a limiting instruction as one ground of his broader claim that he was denied the effective assistance of counsel, we think that our opinion in *Evans* makes it clear that the failure of the trial court to give a limiting instruction in these circumstances requires us on constitutional grounds to give appellant relief

from detention. Accordingly, we find it unnecessary to consider the other grounds for relief presented by appellant.

The judgment of the district court is reversed, and the case is remanded to the district court with instructions to grant appellant relief from detention unless he is retried within a reasonable time.



UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

MAR 26 1976

JOHN P. HEHMAN, Clerk

No. 75-1338

JOE DAWSON,

Petitioner-Appellant,

v.

HENRY COWAN, Superintendent
Kentucky State Penitentiary,

Respondent-Appellee.

FILED
AUGUST WIEDEMER, JR., CLERK
APR 2 1976
U. S. DISTRICT COURT
WEST'N DIST. KENTUCKY

Before: PHILLIPS, Chief Judge, EDWARDS, and McCREE, Circuit Judges.

FILED
APR 29 1976
Criminal
Civil Claims

JUDGMENT

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded with instructions to grant appellant relief from detention unless he is retried within a reasonable time.

No costs taxed.

ENTERED BY ORDER OF THE COURT.

John P. Hehman
Clerk

Issued as Mandate: April 23, 1976

COSTS: None

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Attest:

Deputy Clerk